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# The Legal Theory of the Juridical Coup: Constituent Power Now

By Luigi Corrias \*

## A. Introduction

In a thought-provoking article, Alec Stone Sweet put forward a problem he called the juridical *Coup d'État*.<sup>1</sup> His work was the opening of a debate to which Neil Walker,<sup>2</sup> Wojciech Sadurski<sup>3</sup> and Gianluigi Palombella<sup>4</sup> contributed. In a subsequent essay, Stone Sweet responded to their comments.<sup>5</sup> In this article, I would like to sketch this debate and explore its significance for legal theory. It is my hypothesis that the problem of the juridical coup is closely connected with the relationship between constituent (constituting) and constituted (constitutional) power. Moreover, the juridical coup shows in an exemplary way how this relationship should be understood. Before addressing the problem in these terms (Section C), analyzing an additional example of a juridical coup in EU law (Section D) and developing my own position vis-à-vis the different contributors (Section E), in the following section, I will give an overview of the argument of Stone Sweet. Taking into account the wealth of issues raised by him, I will concentrate on those aspects of his essay that are of most interest from a legal-philosophical point of view. Thus, the first question to be answered is: What are we to understand under a Juridical *Coup d'État* and what is its theoretical importance?

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<sup>1</sup> Alec Stone Sweet, *The Juridical Coup d'État and the Problem of Authority*, 8 GERM. L.J. 915 (2007).

<sup>2</sup> Neil Walker, Comment, *Juridical Transformation as Process: A Comment on Stone Sweet*, 8 GERM. L.J. 929 (2007).

<sup>3</sup> Wojciech Sadurski, Comment, *Juridical Coups d'état—All Over the Place. Comment on "The Juridical Coup d'état and the Problem of Authority" by Alec Stone Sweet*, 8 GERM. L.J. 935 (2007).

<sup>4</sup> Gianluigi Palombella, Comment, *Constitutional Transformations vs. "Juridical" Coups d' État. A Comment on Stone Sweet*, 8 GERM. L.J. 941 (2007).

<sup>5</sup> Alec Stone Sweet, Comment, *Response to Gianluigi Palombella, Wojciech Sadurski, and Neil Walker*, 8 GERM. L.J. 947 (2007).

**B. Reintroducing the Juridical *Coup d'État***

Stone Sweet defines the juridical coup as follows: "By the phrase *juridical coup d'État*, I mean a *fundamental transformation in the normative foundations of a legal system through the constitutional lawmaking of a court.*"<sup>6</sup> First of all, the "'normative foundation' is a precept of a system's higher law."<sup>7</sup> Referring to Kelsen's *Grundnorm* and Hart's rule of recognition, Stone Sweet argues that the juridical coup changes both. Yet, what to make of the concept of "fundamental transformation"? Stone Sweet wants to interpret it restrictively; therefore several conditions should be met. The first condition says that the founders would not have accepted the new constitutional law. Secondly, the new law drastically changes the way in which the system operates, again in a way not intended by the founders. Thirdly, the coup changes the separation of powers. In order to fully understand these conditions, one should bear in mind that Stone Sweet formulates them from the perspective of the founders of the legal order. In other words, to determine whether we can speak of a juridical coup in the first place, we have to go back to the views and intentions of these founding fathers.

The juridical coup raises several issues. At the heart of the matter is the question of how to understand the "fundamental change." Indeed, what should we make of the "endogenous change in a legal system's *Grundnorm*, let alone one accomplished through adjudication"?<sup>8</sup> Stone Sweet points out that Kelsen himself holds that this situation can be characterized as that of a successful revolution. How are we then to understand a court engendering a revolution? It seems that "one deep structural question concerns whether the constitutional delegation to the judge includes substantive constraints on the judge's decision-making (lawmaking)."<sup>9</sup> The second issue regards the scope of judicial discretion as understood by positivist legal theory. Positivism usually legitimizes judicial authority by constraining its power. From this point of view, juridical coups can be classified as arbitrary and irrational. Interestingly, Stone Sweet shows that the juridical coup leaves the legal order floating in limbo for some time: It depends on other authorities whether the coup actually was successful. The success of a juridical revolution must be assessed afterwards, i.e., according to a *new* basic norm.<sup>10</sup>

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<sup>6</sup> Sweet, *The Juridical Coup d'État and the Problem of Authority*, *supra* note <sup>1</sup>, at 915.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 916.

<sup>9</sup> *Id.*

<sup>10</sup> *See id.* "Scholars can reconstruct the legitimacy of the post-coup legal order, and of judicial authority within it, but only in terms of the new Basic Norm and the new Rule of Recognition. The old Norm and the old Rule, once overthrown, cannot provide the normative basis for the way the new legal system evolves after the *coup*." *Id.*

The third matter of interest is conceptual: How to distinguish the juridical coup from other (less far-reaching) acts of juridical interpretation? The criterion Stone Sweet proposes is whether one can speak of a revision of the basic norm. Stone Sweet gives the example of the case of *Griswold v. Connecticut*: “In *Griswold*, the U.S. Supreme Court found that the Federal Constitution contained a right to privacy, at least over reproductive decisions, despite the fact that the Constitution contains no provision on privacy, *per se*. Nevertheless, Douglas, writing for the majority, took pains to package the ruling as a deduction from the structure, content, and the ‘penumbras’ of various provisions of the Bill of Rights. The decision is one of the most controversial in American constitutional history precisely because Douglas seeks so tortuously to avoid the charge that he has fundamentally revised the U.S. Constitution.”<sup>11</sup> A right to privacy was read into the Constitution while the text did not support this. Yet, the reasoning of Justice Douglas was in complete opposition to this apparent lack of ground for the decision. He did everything to show that the U.S. constitution *did* contain a right to privacy.

One of the most interesting features of Stone Sweet’s article is that he discusses three examples of juridical coups. Each of the cases radically changed the face of their respective constitutional system. Furthermore, in deciding these cases, the courts also overstepped their own mandates and came into conflict with other authorities. These authority conflicts were present in all three examples.<sup>12</sup> In *Lüth*,<sup>13</sup> the German Federal Constitutional Court (FCC) legitimized the use of constitutional rights in interpreting statutes and ultimately empowered itself to make a decision regarding the facts of the case—to weigh the interests of the parties itself.<sup>14</sup> With this power, the FCC is able to impose its will (the policy goals it favors) on lower courts.<sup>15</sup> The FCC assigns to itself the task of making a choice among several possible goals which a society ought to pursue. This (political) task normally belongs to the executive. The second example of a juridical coup is

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<sup>11</sup> *Id.* at 918.

<sup>12</sup> *Cf. id.* at 919 (defining an authority conflict as “a governance situation in which the organ empowered to make (or give content to) the law has no direct, jurisdictional means of obtaining obedience from a second organ, whose exercise of authority is necessary to render the law made by the first organ effective”).

<sup>13</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 1 BvR 400/51, 15 Jan. 1958, 7 BVERGE 198.

<sup>14</sup> See Sweet, *The Juridical Coup d’État and the Problem of Authority*, *supra* note <sup>1</sup>, at 921 (“The bottom-line issue is about authority: once the *Rechtsstaat* has been constitutionalised, how can it be defended, given the fragmented structure of judicial authority? The FCC enlists all judges in the project then commands: ‘thou shalt balance’ . . . . When the FCC overrules them, it is on substantive grounds.”).

<sup>15</sup> See *id.* “Even the most fervent supporters of *Lüth* acknowledge that balancing is a relatively open-ended exercise in judicial policymaking. If balancing leads the judge to a choice from among at least two (legally-defensible) policies, why should the FCC possess the power to impose its preferred policy on the courts closest to the dispute—and to the law being interpreted?” *Id.*

Decision 71-44 of the *Conseil Constitutionnel* (French Constitutional Council),<sup>16</sup> in which the Council “began incorporating a charter of rights into the Constitution of the Fifth Republic, knowing full well that the founders had explicitly rejected including such a charter.”<sup>17</sup> Like Justice Douglas, the French Constitutional Council did not admit that it was actually stretching the boundaries of the constitution. Their reasoning was identical: While claiming to remain inside the given constitutional constraints, the judge moves beyond them. Furthermore, as I will argue more fully later, this exact structure may be grasped through the conceptual grid of constituent-constituted power.

The third and last example is taken from the case law of the Court of Justice of the European Communities (ECJ). As is well known, in *Costa* the ECJ stated that EC law has primacy over contradicting national law.<sup>18</sup> There was, however, no explicit legal basis in the EC Treaty for this assertion.<sup>19</sup> The problem lurking in the depths is that of authority and it has two sides. First, there is authority in the sense of the ECJ’s mandate: How far does it reach? With its argument for effectiveness, the ECJ seems to have granted itself an unlimited power.<sup>20</sup> Second, there is the question of the ECJ’s authority *over* national courts. In its case law, the Court is obliging national judges to follow its interpretation of EC law. However, ultimately the ECJ possesses no means whatsoever to force them. According to Stone Sweet, this lack of coercive authority is due to a lack of normative authority.<sup>21</sup> As a consequence, authority conflicts are a matter of course: The question of *Kompetenz-Kompetenz* still remains unsettled and, on a more practical level, authority conflicts keep cropping up.<sup>22</sup>

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<sup>16</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 71-44DC, 16 July 1971, Rec. 29 (Fr.).

<sup>17</sup> Sweet, *The Juridical Coup d’État and the Problem of Authority*, *supra* note <sup>1</sup>, at 919.

<sup>18</sup> Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 1251.

<sup>19</sup> *But see* Walker, *supra* note <sup>2</sup>, at 931.

<sup>20</sup> *See* Sweet, *The Juridical Coup d’État and the Problem of Authority*, *supra* note <sup>1</sup>, at 926 (“Today . . . supremacy and direct effect, ultimately, are about the effectiveness of EC law, but ‘effectiveness’ has had no ultimate endpoint. Instead, the Court has steadily intruded on domains previously thought to be immune to its reach; consider doctrines associated with rights, state liability, and effectiveness of remedy.”).

<sup>21</sup> *See id.* (“The ECJ can command that national judges interpret and apply EC law as it does, but it cannot force them into following its lead. In Europe, a great deal of judicial governance proceeds on this absence of coercive authority, because it proceeds in the absence of normative authority.”).

<sup>22</sup> *See id.* (“As it stands, all basic authority conflicts between the ECJ and national judges are irresolvable under the present Art. 234 system.”). Stone Sweet first points to what he calls “the classic supremacy problems: how to protect rights, settle *Kompetenz-Kompetenz* issues, and determine when the *acte claire* doctrine ought to apply.” *Id.* He also indicates day-to-day issues like the required proportionality tests in the fields of free movement of goods and indirect sex discrimination.

In the conclusion of his article, Stone Sweet restates the notion of the juridical *coup d'état*. He emphasizes that he does not want to take a normative position. A normative account must fail since it refuses to take the radical nature of the coup seriously. A fundamental transformation of the *Grundnorm* cannot be explained by (using arguments deduced from) the *Grundnorm*. Secondly, Stone Sweet remarks that the juridical coup enforces the position of the judge against the executive and legislative branches. Hence, critics of the juridical coup often point to the tension between this phenomenon and the separation of powers. Finally, Stone Sweet pays special attention to the consequences of a juridical coup. It comprises a “‘critical juncture’—a rupture in norms and practices that starts a social system down a new but unpredictable path.”<sup>23</sup> From the original blueprint of the founders, the coup puts the development of the legal system on a completely new track, with consequences both unintended and unforeseen. From the perspective of the court, Stone Sweet asserts that the coup had beneficial consequences in the cases discussed, since “the authority problem itself generated dynamics that have helped propel the system forward.”<sup>24</sup>

### C. The Juridical Coup, Constituent Power and Constituted Power

Now that we have sketched what is to be understood by the judicial coup, we can move on to the next step in our inquiry. It is my hypothesis that the juridical coup takes up the question of creation in law. Traditionally, the problem of creation in law, or, more radically, that of the creation of law, is one of the central issues in constitutional theory. The conceptual instruments involved are constituent and constituted power. So, as I will shortly demonstrate, the juridical coup is theoretically concerned with exactly this relationship. However, the final theoretical significance of the juridical *coup d'état* lies in the way in which it takes up this classic problem. In this section, I will thus proceed as follows: Firstly, I will give a general overview of the received view on constituent power; and secondly, I will show how the concept of the juridical coup questions this established theory.

Drawing explicitly on the concept of “coup,” Stone Sweet broaches the subject of the radical creation of a new legal order. In other words, while Stone Sweet addresses the problem of the creation of legal order, he does so by taking revolution (a coup) as its paradigm.<sup>25</sup> In this way, he implicitly brings up the question of constituent power. As it is directly connected with the revolutions in America and France, the theory of constituent

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<sup>23</sup> *Id.* at 927.

<sup>24</sup> *Id.*

<sup>25</sup> See *id.* at 916 (explaining that “Kelsen himself equated the idea of ‘successful revolution’ with a change in the Basic Norm”).

power is utterly modern.<sup>26</sup> In antiquity, the concept of revolution was unknown. Regime changes were considered to be simply the next stage of an inescapable cycle. Revolutions, as we can learn from Hannah Arendt, cannot be understood with the help of this framework. Indeed, theoretically, “revolutions are the only political events which confront us directly and inevitably with the problem of beginning.”<sup>27</sup> So, the modern nature of the concept of revolution resides precisely in it being “inextricably bound up with the notion that the course of history suddenly begins anew, that an entirely new story, a story never known or told before, is about to unfold.”<sup>28</sup>

In order to understand the full significance of revolution as a political phenomenon and its theoretical significance, one should turn to France at the end of the eighteenth century. It is indeed the French Revolution that has offered the blueprint to all subsequent revolutionary movements.<sup>29</sup> This is where the concepts of constituent and constituted power cut in. Although these notions are usually traced back to the work of Jean-Jacques Rousseau, it is the name of Emmanuel-Joseph Sieyès that is indissolubly linked to them. Extracting bits and pieces from Rousseau where it seemed convenient, yet deviating from him at crucial points, the French abbot and revolutionary Sieyès formulated what is considered to be the established view on the relationship between constituent and constituted power.<sup>30</sup> With his theory, Sieyès wished to give an alternative answer to the fundamental question: Who possesses the highest authority of a state? In his famous political pamphlet *Qu'est-ce que le Tiers état?*, he held firmly that the people, rather than the monarch, are the supreme source of authority.<sup>31</sup> This means that the theory of constituent power is closely linked to the principle of democracy.<sup>32</sup> Indeed, in a democracy, all power flows from the people as a matter of principle. This entails that the people are considered to be the author of the constitution, the political force that gives the

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<sup>26</sup> HANNAH ARENDT, ON REVOLUTION 12 (1973).

<sup>27</sup> *Id.* at 21, 34 (describing “the experience of man’s faculty to begin something new”).

<sup>28</sup> *Id.* at 28.

<sup>29</sup> *Id.* at 50.

<sup>30</sup> It is actually quite difficult to find any textual evidence for the claim that Rousseau invented the concepts of constituent and constituted power. See JEAN-JACQUES ROUSSEAU, *The Social Contract*, in *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 39, 49 (V. Gourevitch ed. and trans., 1997) (“[B]efore examining the act by which a people elects a king, it would be well to examine the act by which a people is a people. For this act, being necessarily prior to the other, is the true foundation of society.”).

<sup>31</sup> See EMMANUEL-JOSEPH SIEYÈS, WHAT IS THE THIRD ESTATE? 126 (1963) (“The national will . . . never needs anything but its own existence to be legal. It is the source of all legality.”). Since it has no consequences for the argument, in this article, I will make no distinction between nation and people.

<sup>32</sup> Cf. ANTONIO NEGRI, INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE 1 (1999) (“To speak of constituent power is to speak of democracy.”).

constitution.<sup>33</sup> In other words, the people are the subject of constituent power without being itself constituted by law. The people as the ultimate source of all law and legitimacy are, as such, independent. Accordingly, the people as constituent power are conceived of as some sort of god: One and undividable, transcendent, omnipotent, and therefore able to create from a void (*creatio ex nihilo*). One could thus say that Sieyès replaced the old religious political theology of the *droit divin* with the new secular political theology of the sovereign people.<sup>34</sup> On the other hand, there are the powers called into being by the constitution: the legislature, the executive power, and the judiciary. These are so-called constituted or constitutional powers. According to Sieyès, constituent and constituted powers are strictly separated. In his model, there is a clear primacy of the constituent power vis-à-vis constituted power: For Sieyès, constituted powers are subordinate to the constituent power because their power ultimately depends on that of the people as the constituent or sovereign power of a democratic state (power *over* law). Indeed, their power is only an emanation of the constituent power of the people. The power of the state organs only exists due to, and is limited by, the constitution (the law). State organs are bearers of constituted power; this is legal power, or competence (power *in* law).

Sieyès's theory reads as a chronological tale of the birth of the legal order. The act of giving the constitution is the start, the origin of the legal order. The nation, the originator of the constitution, should hence be understood as a *prima causa*. That is why Sieyès holds that the nation's existence precedes everything: "The nation is prior to everything. It is the source of everything. Its will is always legal."<sup>35</sup> Moreover, the nation is not even allowed to bind itself to a positive form. It is independent of all forms. Therefore, Sieyès can hold that the nation stays in a state of nature.<sup>36</sup> This means that it is, and remains, absent from the legal stage. This is exactly why the nation needs to be represented in the legal order. This is the task of the representative body: to replace the nation and act in its place.<sup>37</sup> That explains why the constitutional forms posed by the nation bind this body.

It is not difficult to discern in this scheme of reasoning the dualistic relationship between nation (constituent power), on the one hand, and state organs (constituted power) on the

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<sup>33</sup> See SIEYÈS, *supra* note <sup>31</sup>, at 119 ("If we have no constitution, it must be made, and only the nation has the right to make it.").

<sup>34</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *Die verfassunggebende Gewalt des Volkes—Ein Grenzbegriff des Verfassungsrechts*, in STAAT, VERFASSUNG, DEMOKRATIE. STUDIEN ZUR VERFASSUNGSTHEORIE UND ZUM VERFASSUNGSRECHT 90, 95 (1991).

<sup>35</sup> SIEYÈS, *supra* note <sup>31</sup>, at 124.

<sup>36</sup> See *id.* at 127–28 ("We must conceive the nations of the world as being like men living outside society or 'in a state of nature,' as it is called.").

<sup>37</sup> See *id.* at 137 ("If it is to accomplish its task, the representative body must always be the substitute for the nation, itself.").



other. First, there is the nation: omnipotent, independent, unbound, the “formless forming” subject of the constitution.<sup>38</sup> By stating that the nation cannot leave the state of nature, Sieyès emphasizes that there is an absolute (and not merely a relative) difference between the nation as constituent power and the organs of the state.<sup>39</sup> The latter only exist after, and as an effect of, the creative labor of the nation. The powers of the state are dependent on the nation, bound by the constitutional ties it formulated. The dualism of Sieyès consists thus in a combination of the Separation Thesis and the Primacy Thesis. According to the Separation Thesis, constituent power and constituted power are not only to be distinguished conceptually, but rather, they are strictly separated. While the nation as constituent power is situated *outside* the legal order, the constituted power of the state organs is power *inside* the legal order. Secondly, the Primacy Thesis says that the two poles are not of equal importance. Sieyès assigns a primacy to the constituent power over the constituted power. The nation is *independent*, whereas the state organs are *dependent* (upon the nation). This dualistic scheme of Sieyès has direct consequences for the concept of (legal) competence. As mentioned above, unlike the nation, state organs do not have unlimited power. State organs possess competences: power created and limited by law. In the case of a judicial body, this is referred to as its mandate.

It is exactly here that the juridical coup calls into question Sieyès’s view on constituent power (which is generally accepted in constitutional theory). Stone Sweet describes a coup: a revolutionary change of the legal order. In that sense, his article regards the same theoretical issue as the famous essay of Sieyès. However, the two differ fundamentally as to the question of who is to be seen as the *subject* of constituent power. Whereas Sieyès passionately points to the nation, and the nation only, as the bearer of constituent power, Stone Sweet’s description of the juridical coup seems to point to an alternative subject. Indeed, the reason why the concept of a *juridical* coup generates so many authority questions is that it seems to appoint a court (a juridical body having only constituted power) as the subject of the revolution and therefore the bearer of constituent power. From the vantage point of Sieyès, this would be highly problematic.

Yet, it would be a mistake to jump to the normative conclusion that a judicial coup is by definition wrong because a court oversteps its mandate by assuming constituent power (a power that only belongs to the nation or people as the sovereign power of a state). Instead of taking a normative standpoint on this phenomenon, I submit that it is worthwhile to explore the theoretical significance of the juridical *coup d’état*. Accordingly, I will take it as an undeniable fact that courts sometimes trigger revolutionary changes of a legal order and that the cases Stone Sweet discusses provide excellent proof for this claim. Nevertheless, in the next section, I will discuss another example of the juridical coup, again

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<sup>38</sup> Cf. CARL SCHMITT, VERFASSUNGSLEHRE 79 (1970).

<sup>39</sup> Cf. ARENDT, *supra* note <sup>26</sup>, at 19–20 (“For, the hypothesis of a state of nature implies the existence of a beginning that is separated from everything following it as though by an unbridgeable chasm.”).

taken from the EU legal order. What I am interested in is what the phenomenon of the juridical coup means for our understanding of *the relationship between* constituent power and constituted power. What the juridical coup shows is not so much that a court becomes the new constituent power. Rather, it is my hypothesis that the juridical coup fundamentally questions the dualistic way of understanding constituent and constituted power and provides us with a new and non-dualistic framework to grasp this relationship and the authority problems involved.

#### **D. The Juridical Coup in the EU: The Case of Maria Pupino**

Before I return to the theoretical issue at the heart of this article, in this section I would like to discuss one other example of a juridical coup taken from the case law of the Court of Justice of the EU (ECJ)—the *Pupino* case.<sup>40</sup> Central to this judgment was the question whether or not national authorities were under the obligation to interpret national law in conformity with a framework decision. In the case against a kindergarten teacher, Maria Pupino, the ECJ was asked whether the Italian judge should interpret national criminal law in conformity with a framework decision regarding the protection of vulnerable witnesses. It is important to notice that, at that time, Article 34 of the EU Treaty (now repealed) expressly precluded this possibility, as it mentioned explicitly that framework decisions did not possess direct effect. However, the ECJ still held that Italian law had to be explained in conformity with the framework decision under discussion. In other words, the duty of consistent interpretation was extended to framework decisions, which means that they possess *de facto* direct effect, also known as indirect effect. Now, let us look at the Court's reasoning more closely to find out how it could reach this conclusion.

After stating that it had jurisdiction, the ECJ observed that the formulation of a "framework decision" in the EU Treaty was identical to that of a directive, as defined in Article 249 EC.<sup>41</sup> From this, the Court inferred that national authorities were under the obligation to interpret national law in conformity with a framework decision.<sup>42</sup> It based this conclusion on the following considerations:

Irrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe within the meaning of the second paragraph of Article 1 EU, it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it

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<sup>40</sup> Case C-105/03, Criminal Proceedings Against Maria Pupino, 2005 E.C.R. I-5285.

<sup>41</sup> See Treaty on the Functioning of the European Union art. 288, 1 Jan. 1958.

<sup>42</sup> Case C-105/03, Criminal Proceedings Against Maria Pupino, 2005 E.C.R. I-5285, para. 34.

useful to make provision, in the context of Title VI of that treaty, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union's objectives.

The importance of the Court's jurisdiction to give preliminary rulings under Article 35 EU is confirmed by the fact that, under Article 35(4), any Member State, whether or not it has made a declaration pursuant to Article 35(2), is entitled to submit statements of case or written observations to the Court in cases which arise under Article 35(1).

That jurisdiction would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions in order to obtain a conforming interpretation of national law before the courts of the Member States. . . .

The second and third paragraphs of Article 1 of the Treaty on European Union provide that that treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe and that the task of the Union, which is founded on the European Communities, supplemented by the policies and forms of cooperation established by that treaty, shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.<sup>43</sup>

In this revolutionary case, the ECJ argues that for reasons of "effectiveness" amounting to the very stakes of European integration, the principle of conforming interpretation should also apply to third pillar framework decisions. However, this obligation could be limited by general principles of law, especially the principles of legal certainty and non-retroactivity. Furthermore, it could form no basis for *contra legem* interpretation of national law. Finally, the ECJ held that it was for the national court to decide whether conforming interpretation is possible in a particular case. In this decision, it should also respect the constitutional traditions of the Member States and the ECHR, in particular Article 6.

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<sup>43</sup> *Id.* at paras. 36–38, 41.

We see that the ECJ takes a very specific view of the EU Treaty (the third pillar). It stresses that this Treaty is, first and foremost, a new step in the integration process that started with the Treaty of Rome. So, posing the “ever closer union” as the goal of European integration, it then goes on to ask what would constitute the most effective means to reach this goal. Accordingly, the perspective of the *unity* of the integration process brings the ECJ into the situation that it is confronted once again with the very objectives underlying this process. Now, an attentive reading of the Court’s reasoning reveals that these are not two distinct arguments, but actually one and the same. The reference to the principle of loyal cooperation plays a crucial role here. The ECJ held that:

[i]t would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions.<sup>44</sup>

So, why does *Pupino* qualify as an example of a juridical coup? Does it meet the criteria set by Stone Sweet?<sup>45</sup> First of all, one may argue that the judgment in *Pupino* constituted a fundamental change in the normative foundations of the legal system. Before the ruling, one could maintain that “[o]ne of the fundamental differences between first and third pillar law is that, as is stated explicitly in the Treaty, Framework Decisions—the main legislative instrument in the third pillar and equivalent as to the form to Directives—do not have direct effect.”<sup>46</sup> *Pupino* was a revolutionary case precisely because it brought the third pillar much closer to the first pillar of the Union.<sup>47</sup> In other words, one might say that *Pupino*’s constitutional significance resided in the fact that it made way for the *unity* of the Union. In this sense, the ECJ pre-empted the Lisbon Treaty, which abolished the pillar structure.

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<sup>44</sup> *Id.* at para. 42.

<sup>45</sup> Sweet, *The Juridical Coup d’État and the Problem of Authority*, *supra* note <sup>1</sup>, at 915–918.

<sup>46</sup> Valsamis Mitsilegas, *Constitutional Principles of the European Community and European Criminal Law*, 8 EUR. J.L. REFORM 303, 309 (2007).

<sup>47</sup> Dutch legal scholar René Barents even went so far as to compare the importance of the *Pupino* ruling for the third pillar with that of the *Van Gend en Loos* judgment for the first pillar. See R. Barents, *Noot onder het Pupino-arrest*, 14 SOCIAAL-ECONOMISCHE WETGEVING 74 (2006).

Second, one may also say that the founders would not have accepted this new constitutional law. In the case of the EU, the founders are the Member States. One may take a look at the text of the Treaty at that time and note that framework decisions were not supposed to have direct effect. Nevertheless, the ECJ valued the effectiveness of integration higher than the intentions of the signatories of the Treaty.<sup>48</sup> Furthermore, one can refer to the arguments given by several national governments during the proceedings at the ECJ. The French government held that framework decisions could not possess direct effect and that conforming interpretation would not be possible in this case, since it would amount to a deterioration of the position of the accused.<sup>49</sup> The Italian, Swedish, and United Kingdom governments stressed the difference between framework decisions and directives and maintained that, in the light of the supra-national nature of the cooperation within Title VI of the EU Treaty, the former could not imply the duty of conforming interpretation for national courts.<sup>50</sup> The Dutch government called to mind the limits of conforming interpretation and questioned whether these limits would not have been reached in the present case, provided that framework decisions could lead to a duty of conforming interpretation.<sup>51</sup>

Thirdly, *Pupino* meant a drastic change in the functioning of the system. The introduction of conforming interpretation makes it much easier for citizens of the Member States to rely on a framework decision in proceedings in their national court. The ECJ has thus increased its hold over the national courts, and that goes especially for the Italian judge in this particular case.<sup>52</sup> Furthermore, since the ECJ was answering questions posed to it by a national criminal court ruling on an internal matter, *Pupino* made it clear that criminal law does not constitute a special part of national law, where EU law has little or nothing to say. From the perspective of EU law, criminal law is not different from any other part of national law.<sup>53</sup> Then, there is the reference to the principle of loyal or sincere cooperation. This could have all kinds of consequences that would bring the third pillar much closer to the first one. Lastly, there is a change in the separation of powers of the EU. For all the reasons stated above, one may definitely say that the ECJ has made its own role in the

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<sup>48</sup> See Mitsilegas, *supra* note <sup>46</sup>, at 311 (“It [the ruling in *Pupino*, LC] is also irrespective of the degree of integration the States signatory to the Amsterdam Treaty wished to achieve in criminal matters—the Court dissociates the envisaged degree of integration from the need of ensuring the effective achievement of Union objectives.”).

<sup>49</sup> Case C-105/03, Criminal Proceedings Against Maria Pupino, 2005 E.C.R. I-5285, para. 24.

<sup>50</sup> *Id.* at paras. 25–26.

<sup>51</sup> *Id.* at para. 26.

<sup>52</sup> See Mitsilegas, *supra* note <sup>46</sup>, at 312 (“The impact of the application of the interpretive obligation of the national judge in this case is striking. The Luxembourg Court has in reality re-written the Italian Code of Criminal Procedure.”).

<sup>53</sup> Barents, *supra* note <sup>47</sup>, at 77–78.

third pillar stronger. We may thus conclude that it simply ticks all the boxes: *Pupino* is a fine example of a juridical coup. Having given another example of a juridical *coup d'état*, I would like to return to the theoretical problems provoked by this phenomenon. In discussing these, I will not only refer to the examples given by Stone Sweet but also to *Pupino*. Furthermore, I will also take into account the views expressed by Stone Sweet's discussants.

### E. The Juridical Coup Revisited

That Stone Sweet's essay was both insightful and provocative is shown first of all by the different reactions it received from Neil Walker, Wojciech Sadurski and Gianluigi Palombella. In this section, I will return to the theoretical issues central to this paper by raising several points that came up in the contributions of Stone Sweet and his critics. Along the way, I will show how the structure of the juridical *coup d'état* leads to an alternative understanding of the theory of constituent power.<sup>54</sup>

The *first* important point concerns authority. We have seen that Stone Sweet argues that the juridical coup provokes all kinds of questions concerning authority. But in which way is authority at stake in the action of engendering the coup itself? In order to answer this question, it is important to keep in mind Stone Sweet's comments on the specific manner of reasoning in the judgments discussed. The argumentation of Justice Douglas in *Griswold v. Connecticut*, as well as that of the *Conseil Constitutionnel*, seemed strange to Stone Sweet: While giving a new meaning to a legal text, they tried to make it seem as if this meaning was already part of the text. In other words, establishing a new meaning is done, paradoxically, by presenting it as an established meaning.

We have also encountered this manner of argumentation in the case of *Pupino*, where one could reformulate the reasoning of the ECJ as follows: The EU Treaty, being a new step towards "an ever closer Union," *implies* the application of the principle of loyal cooperation which, in turn, *implies* the obligation of conforming interpretation for national authorities. The Court thus uses teleological reasoning (posing the goal of the integration process) and, given this goal, concludes to the *necessary implication* of the obligation of interpretation in conformity therewith. The Court of Justice links the objectives of the Treaty to the principle of loyalty, and then goes on to use this principle to derive the duty of conforming interpretation as its necessary corollary. Note that this structure of implication has a paradoxical nature: The ECJ, defending the objectives of European integration, and thus remaining faithful to the Treaty, goes beyond the established meaning of that very Treaty. At the same time, however, the ECJ does everything it can to

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<sup>54</sup> My understanding of the relationship between constituent and constituted power is close to that of Hans Lindahl. See, e.g., Hans Lindahl, *The Paradox of Constituent Power: The Ambiguous Self-Constitution of the European Union*, 20 *RATIO JURIS* 485 (2007).

make a credible claim that it is only unfolding what was already implied in the Treaty.<sup>55</sup> The paradox is that while presenting a *new* theory of the constitution, the courts did all they could to make a credible case that they were only applying the *old* constitutional text.

Stone Sweet seems to miss this paradoxical nature of the judicial coup.<sup>56</sup> However, it is not without significance. On the contrary, it takes us to the very heart of the authority problem involved in the juridical coup. The reasoning of the court performing the coup takes up the problem of authority as it is always encountered by revolutionaries. The only way of founding a new order is to impose a new authority by law. However, this new authority only counted as *authority* if it could, one way or another, link up with what was already authoritative. The birth of a new legal order cannot be justified without referring (to a minimal degree) to the authorities overthrown.<sup>57</sup> These old authorities have to be pictured as the wrong agents at the right place. The revolution would lose its stakes if the place would vanish together with its occupants. That is why the court has to argue in a paradoxical way and hold that the new meaning had been “always already there” and the court simply found it. This reasoning reflects *the paradoxical relationship between constituent and constituted power*: In a juridical coup, the court acting as a constituent power (inventing a new meaning) claims to be just restating what was an old meaning. Note that the structure of authority makes this reasoning necessary. Indeed, the Court could not do otherwise: In order to be successful, an act of constituent power can only be veiled as constituted power. *Pace* Stone Sweet, radical revision and plain interpretation cannot be juxtaposed. The coup is a radical revision that claims to be nothing else than an ordinary interpretation.

The *second* aspect that is of interest to us concerns the following question: When can one say that a juridical coup has been successful? In his contribution, Gianluigi Palombella discusses this topic and, much like Stone Sweet, points out that this is to be decided by others than the court itself.<sup>58</sup> In this respect, I would like to emphasize that whether or not one may speak of a *successful* juridical coup can only be determined *in retrospect*. This means that a court (or for that matter, any other actor) can only be said to have established a true coup when the fundamental transformation in the (functioning of the) legal order is actually accepted by other officials (in the sense of Hart). *Introducing* a new meaning is an act that can be performed by a court (one actor). However, this act is never

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<sup>55</sup> This “logic of implication” may be discerned in many places in the case law of the ECJ. For an analysis, see LUIGI CORRIAS, *THE PASSIVITY OF LAW: COMPETENCE AND CONSTITUTION IN THE EUROPEAN COURT OF JUSTICE* (2011).

<sup>56</sup> See Sweet, Response, *supra* note <sup>5</sup>, at 951 (“[I]n the three cases I identified, the judges did not bother themselves much with legal text or precedent. The GFCC and the ECJ based their decisions on new theories of the constitution.”).

<sup>57</sup> See ARENDT, *supra* note <sup>26</sup>, at 38–39, 155.

<sup>58</sup> See generally Sweet, *The Juridical Coup d’État and the Problem of Authority*, *supra* note <sup>1</sup>.

enough to make this new meaning into an accepted one. In other words, *establishing* that new meaning can only be done by others (a plurality of actors) who in their action repeat this new meaning, thus marking it as accepted. Indeed, only if other officials take up the new meaning can it ever become the established meaning. In the case of *Pupino*, one may say that the Member States have accepted the “depillarization” advocated by the ECJ. As is well-known, the Treaty of Lisbon abolished the pillar structure.

Ultimately, Palombella seems to miss the point when he comments that “the Court does not claim for itself any authority it does not already possess under the existing constitution. This is an unsurprising, and perhaps—in the denial of agency by the beneficiary—hypocritical, feature of legal ‘discovery’ but one nevertheless that sits uneasily with the idea of a coup.”<sup>59</sup> He is right when he asserts that the court does not claim for itself an authority that it does not already possess. Indeed, as was my first point, in a juridical coup a court passionately argues that what it does is completely *within* the established boundaries of a legal text. However, while it claims to restate an old meaning, the court actually invents a new meaning. The change from an old meaning to a new one is thus presented as a metamorphosis. This type of change has a paradoxical nature which results from the paradoxical relationship between constituent and constituted power. Far from attributing this to the “hypocrisy” of the court as Palombella does, I would like to emphasize the necessity of this structure. The court can only be a constituent power while claiming to remain a constituted power. This is exactly the structure that underlies the idea of a coup.

The innovative nature of the phenomenon described by Stone Sweet is that a court, a judge, and/or the judicial branch are responsible for a coup. This is the basis for the *third* point: By saying something about the normative borders of the constitution, the court also says something about its own role and, more specifically, about its own power or mandate. In this respect, I agree with a point Sadurski makes against Stone Sweet: There cannot be a strict distinction between substantive and structural elements in the case of a coup.<sup>60</sup> A juridical coup always brings about radical change to both substance (a new meaning to a

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<sup>59</sup> Cf. Palombella, *supra* note 4, at 944.

<sup>60</sup> See Sadurski, *supra* note 3, at 937.

[A]ny decision which is novel in the substantive sense—which is path breaking in taking a decision which some people who are reasoning in good faith may believe is not authorized by the constitution, is at the same time structural because it implies an assertion that the court has the competence not only to decide that which it has actually decided but also, more generally, in the sphere in which it has entered.

*Id.* In his response, Stone Sweet admits this point, albeit with some reservations. See Sweet, Response, *supra* note 5, at 952–53.



constitutional text) and structure (a new meaning to the mandate of the court and a reinforcement of the court vis-à-vis the other branches of the government). This means that, one way or another, a juridical coup always has something to do with competences.

The *fourth* point is related to this, since it concerns the mandate of the Court. One would say, as Palombella does, that, in the case of a juridical coup, the judge clearly oversteps the limits of his or her own mandate.<sup>61</sup> However, this simple picture does not suffice. I would like to call the action of the court in a juridical coup a grasping of authority. Indeed, it shows how a mandate, being a kind of competence or legal power, is not only power *in* law but also power *over* law. The coup of the court is self-mandating, an act in which the court empowers itself to take a decision on the legal order as a whole. Again, the ECJ's reasoning in *Pupino* is illuminating in this respect. Remember how the Court explicitly took the perspective of the integration process *as a whole*, and that is exactly why it invoked the principle of loyalty or sincere cooperation. This step was necessary because it was only from the perspective of the *unity* of the integration process that the ECJ could take a step towards depillarization and find the need to conform interpretation of framework decisions.

Stone Sweet makes a similar point in response to his critics when he emphasizes the fundamental nature of the juridical coup as changing both the rule of recognition and the Basic Norm of the legal system in question.<sup>62</sup> In connection with this, Stone Sweet's

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<sup>61</sup> Cf. Palombella, *supra* note 4, at 941.

Although there is not room for a theory of a coup d'État to be outlined here, according to the common view, when a competent power acts within the limits of its conferring rules, explicates its own tasks within the range of the rules of the game, without asserting a new, previously un-conferred—power for the future, this would be unlikely to be characterized as a coup.

*Id.*

<sup>62</sup> Cf. Sweet, Response, *supra* note 5, at 947 ("In each system, a court had moved to confer upon itself new constitutional-jurisdictional authority, in the course of performing its delegated adjudicatory tasks; and these rulings gradually provoked systemic transformation."). A little further, he adds:

Constitutional courts are an obvious and significant part of government in modern constitutional systems of delegated powers. When they delegate to themselves new jurisdictional authority, in 'a manner not prescribed by the constitution,' thereby fundamentally changing the structure of delegated arrangements, then we are presumptively in the world of the *juridical coup d'état*.

*Id.* at 949. Finally, making the link between the juridical coup and constitution-building: "The judges that instigated my coups conferred upon themselves new expansive capacities to 'complete' constitutions, displacing constituent authority as regulators of constitutional development. Hovering above every coup, it seems, is the specter of judicial supremacy—over constitutional development—and in Europe supremacy is rarely a focus of theorists." *Id.* at 952.

emphasis on the opinion of the founders is also understandable. This perspective is necessary to assess the degree of innovation of a juridical decision. The question remains, however, whether one should really look for something as an original intention, as Stone Sweet suggests. In my opinion, Neil Walker is completely right to point to the weaknesses of the counter-factual test that Stone Sweet has devised to determine whether one may speak of a juridical coup or not.<sup>63</sup> Yet, I do think it cannot be denied that sometimes courts go so far in their interpretation that they radically change what until then counted as the “established interpretation.” The court grasped authority to change the meaning of the constitutional text and only in hindsight will we know whether the newly introduced meaning becomes the established meaning. However, the grasping of authority does not tell us the whole story about the coup, either. What is not yet taken into account is the institutional role of the court. As a constituted power, as a judicial body, a court cannot do otherwise than claim to remain within the established normative borders of its own mandate. When a court is *grasping* authority, when it is in the process of creating something fundamentally new, it is also always *being grasped* by the system, by its institutional role as created in the old order. Both grasping and being grasped, what the juridical coup shows is how constituent power and constituted power are much closer connected to each other than the dualistic model of Sieyès suggests.

Walker wants to discard the notion of a juridical coup and proposes to conceive of juridical transformation as a process.<sup>64</sup> However interesting this suggestion might be at first sight, it ultimately begs the question. The concept of a process chooses the perspective of the third person and in this way regards change as something given. It thus denies that juridical transformation has to begin somewhere. The radical nature of the coup resides in the fact that it takes a fundamental change in a legal order seriously from the first person perspective. In other words, the juridical coup is not about the process of transformation but about *triggering* that process. Hence, I do not support Sadurski’s conclusion that this makes the category of a juridical coup uninteresting for analysis. Yet, perhaps it is a false dilemma to regard juridical transformation either as a coup or as a process. Like Walker and Sadurski, I am of the opinion that the difference between juridical coups and other ways of judicial innovation is one of degree.<sup>65</sup> However, and here I disagree with Sadurski and Walker, far from making the category of the coup irrelevant, this shows its crucial importance. Indeed, the juridical coup is the exception that shows what is at stake in the normal case. The title of Sadurski’s article, “Juridical Coups d’état—all over the place,” is true in a much deeper sense than its author might have had in mind. As I have argued, the juridical coup shows the way in which creation in law should be understood because it brings to the fore the specific way in which the relationship between constituent and

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<sup>63</sup> See Walker, *supra* note 2, at 930–31.

<sup>64</sup> *Id.* at 932.

<sup>65</sup> Sadurski, *supra* note 3, at 939; see also Walker, *supra* note 2, at 931–32.

constituted power needs to be understood. The coup shows juridical transformation in all its pertinence. And since there is only a relative difference between a coup and a “normal” form of transformation, what goes for the coup also applies to all those other cases that provoke less radical change. Therefore, the *fifth* important aspect I put forward is that one could say that *all* normative innovation has the structure of a juridical *coup d’état* and that is exactly why studying this phenomenon is worthwhile. If we can put our finger on the structure of the juridical coup, we will also understand the category of the “normal” innovation.

Almost at the end of our analysis, a normative question remains to be answered. As a coup, does the juridical *coup d’état* not carry with it the strong smell of illegitimacy? Sadurski poses this question, suggesting that even Stone Sweet’s analysis is not merely descriptive, as the latter claims it is, but also normative: “It is hard to dispel the impression that Stone Sweet, notwithstanding his protests to the contrary, has a certain negative attitude towards the decisions he dubs juridical coups d’état; there is a sense of usurpation, illegitimacy and unfoundedness there.”<sup>66</sup> One should not forget that all the court can do is *claim* to introduce a new meaning of a constitutional text; it is again dependent on others that substantiate this claim and make this introduced new meaning an established interpretation of the constitutional text.<sup>67</sup> That this possibility of contestation exists and change remains possible is my *sixth* point. Every court’s claim to the truth remains contestable; there is always the possibility that a certain interpretation later proves to have gone too far. As I have argued above, this can only be decided in hindsight. My own position is therefore close to that of Stone Sweet when he writes: “In each of my coups, one set of officials (judges) proposed a change in the Rule [of Recognition, LC], which provoked a social process that involved other officials. It is, of course, theoretically possible that the proposed change (the event) would ultimately be rejected by officials (the process).”<sup>68</sup> Furthermore, I would like to emphasize that something like a perfect foundation remains impossible. The interconnectedness of constituent and constituted power that I have stressed presupposes their ultimate independence. Constituent power and constituted power cannot ever coincide. Their coincidence is imminent; a hiatus remains, an abyss of all foundations. A democratic legal order will not deny that abyss but foster it as a constant reminder of the fragility of any power. For the courts in such an order, it might call to mind the value of prudence that should be taken into account in every decision. Perhaps, that is what *juris-prudence* is all about.

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<sup>66</sup> Sadurski, *supra* note 3, at 935.

<sup>67</sup> In the context of the EU, here lies an important role for the Constitutional Courts of the Member States. Without their support, it is difficult to imagine how the ECJ can continue to make such far-reaching decisions as it does now. See MONICA CLAES, *THE NATIONAL COURTS’ MANDATE IN THE EUROPEAN CONSTITUTION* (2006) (explaining this issue); WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* (2005) (explaining this issue).

<sup>68</sup> Sweet, Response, *supra* note <sup>5</sup>, at 952.

## F. Conclusion: Constituent Power Now

In this article, I have argued that the phenomenon of the juridical *coup d'état* sheds a new light on a classic problem of legal theory: the relationship between constituent and constituted power. The juridical coup shows how the dualistic understanding of this relationship should be rejected. It is time to bind the threads together. Remember how the dualism was analyzed above as a combination of the Separation Thesis and the Primacy Thesis. According to the Separation Thesis, constituent power and constituted power are strictly separated. The Primacy Thesis assigns a primacy to the constituent power over the constituted power. Now, the juridical *coup d'état* questions the Separation Thesis, because it shows how the political act of giving the constitution (an act of constituent power) should always claim to be a legal act (an act of constituted power). In other words, power *over* the law, power in the strong sense of the word, may only work as it makes a credible claim of being legal power, power *in* the law.<sup>69</sup> In one fell swoop, this also questions the Primacy Thesis. There is not first an *independent* nation which creates a legal order of dependent constituted powers. Not only are the bearers of constituted power or legal competence dependent of the nation to assign them authority, the reverse is also true. Indeed, the nation cannot act by itself because it is not one. The collective, the “we,” supposedly the subject of constituent power, needs to be constituted itself and this is done in an act of representation.<sup>70</sup> The nation is *dependent* on the bearers of constituted power to the extent that the nation cannot act as constituent power without being represented by a constituted power. The court is such a constituted power and such a representative. In some polities, the judicial branch is even the representative *par excellence*.<sup>71</sup> This means that, far from being an uninteresting category, the juridical coup *d'état* forms an important phenomenon which helps to explain the intertwined relationship of constituent and constituted power.

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<sup>69</sup> As Hans Lindahl and Bert van Roermund have strongly argued, this is exactly the function of the Basic Norm in Kelsen's work. See Lindahl, *supra* note 54, at 488; B. van Roermund, *Authority and Authorisation*, 19 L. & PHIL. 201 (2000).

<sup>70</sup> For more on this point, see H. Lindahl, *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood*, in *THE PARADOX OF CONSTITUTIONALISM* 9 (Martin Loughlin & Neil Walker eds., 2007) and B. van Roermund, *First-Person Plural Legislature: Political Reflexivity and Representation*, 6 PHIL. EXPLORATIONS 235 (2003).

<sup>71</sup> I would say that the EU is a case in point. See CORRIAS, *supra* note 55.

